FILED
MAR 20
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1347

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

GARY GREEN,

Petitioner,

v.

MAURICE P. FOLEY,

Respondent.

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Bruce Lawrence Adelson
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Counsel of Record

March 20, 1989

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December 14, 1984

Mr. Alan M. Silverstein
Mr. Stephen M. Zimpel
7297 Lee Highway
Falls Church, VA 22042

Re: Silverstein and Zimpel

Dear Alan and Stephen:

I represented the two of you in connection with your acquisition of an interest in DEG. When I met with you in April, we agreed that in addition to my hourly rate, which DEG was to pay, if the deal was consumated [sic], the two of you would pay me or my firm a fee of $10,000.00 for acting as a finder and for collateral services.

On November 28, 1984 I met with you again at your office. During our discussion I raised the question of the $10,000.00, which still had not been paid. You both acknowledged the debt and offered

my an alternative payment based on negotiable notes and guarantees signed by a general partner (Foley) in one of your real estate deals. You offered to buy the notes and guaratees from the banks in my name in order to free up your lines of credit on the one hand, and to pay your debt to me on the other. Subject to your completion of all of the conditions set forth below, I agree to accept the alternative payment.

The conditions are as follows:

1. You will purchase in or have assigned to my name (or the name of my law firm) notes and guarantees signed by Foley (and his wife) from certain banks, including Mount Vernon Savings and Loan as well as Sovran Bank.

2. The notes and guarantees will have a purchase price and a net amount due in a sum in excess of $275,000.

3. The notes and guarantees will not be marked cancelled.

4. The costs of acquiring the notes and guarantees and of enforcing them (unless I elect to assume the costs of enforcement) will be paid by you.

5. Anything that is collected on the notes and guarantees will belong to me (or my firm if I so elect).

6. You have represented to me that the notes and guarantees are valid but that you believe Foley may not have sufficient assets to pay same; therefore, you do not guarantee collection, and that is a risk I will assume.

7. You also represented that Foley had breached his agreements with you and that you have set offs and counter-claims against him. I advised you that you will not be given credit for the payments made to acquire the notes and guarantees

because I will be the legal purchaser. You stated that you would assume the risk of any lawsuit by Foley for contribution and that whatever I recovered from Foley (and/or his wife) would not be subject to a reduction or payment by me to you for any sum Foley might be awarded from a cross claim, lawsuit or other action against you. In other words, I will retain whatever I recover from Foley without regard to what occurs between you and Foley.

8. If you are unable to acquire the notes and guarantees mentioned above by April 1, 1985, or if you do not satisfy the conditions, I will have the option of terminating this agreement, in which event, the said $10,000.00 fee will be paid by you.

If there is anything in this letter which does not accurately describe our agreement, please advise me promptly.

I am greatful for the opportunity you have offered in this innovative fee payment agreement.

Sincerely,

/s/ Gary Green

GARY GREEN

52000003.ltr

July 15, 1988

Clerk of the Court
United States Court of Appeals
For the Fourth Circuit
United States Court House
Tenth & Main Street
Richmond, Virginia 23219

Re: 87-2639 Green v. Foley
87-2685 Green v. Foley
Argued July 5, 1988

Dear Sir or Madam:

This responds to a copy of a letter I received three days ago, dated July 6, 1988, which was dispatched after oral argument to Judges Winter, Murnaghan and Sprouse (the members of the panel in the above-referenced appeals) by counsel for appellee Green. I represent the appellant, Maurice Foley.

After reviewing the content of that letter to the panel from opposing counsel, I recognized that it represented an ex parte communication to the Judges,

which appeared to me to be a procedure neither provided for by the Rules nor familiar to me as a matter of local practice. Uncertain how (or even whether to respond to the inaccuracies and argument contained in the letter, I contacted the case manager of the file in Richmond. He suggested that I send this letter response to you.

Please forward it (I have enclosed three copies) to Judges Winter, Murnaghan and Sprouse so that they will have it in addition to the letter already dispatched to them by my opponent in the event that they are inclined to consider the letters as part of the appeal.

By way of response to the July 6th letter, it will be remembered that Judge Winter cogently identified the gravamen

of Foley's appeal, namely, the material misrepresentations made by Green in his pleadings and motions relative to the manner in which he acquired the note and guaranty agreement.

Judge Winter specifically asked that I relate those misrepresentations to the use of the partnership account and the cashier's check which resulted in the payment and discharge of the debt by the partnership. Judges Sprouse and Murnaghan followed up with pertinent questions and comments regarding the impact of Green's misrepresentations upon Foley's ability to advance the meritorious defense of payment.

The issue was not, nor has it ever been, dilatory discovery but rather the affirmative misrepresentations contained

in Green's pleading and motions. Counsel for Mr. Green has not engaged that central issue either at oral argument or in his recent letter to the Court.

As the Court noted at oral argument (and as counsel for Green acknowledged), the Green letter to his co-conspirators Zimpel and Silverstein was handed to Foley's counsel immediately prior to the argument on the motion for summary judgment. That its production ultimately led to the uncovering of the carefully planned conspiracy misses the point that Green's numerous misrepresentations in his pleadings and motions (which, as the Court also noted, included Green's false affidavit that he had purchased the note and guaranty for full value) prevented Foley from advancing the defense of payment, which is dispositive of the

Green claim. Even if Foley had engaged in no discovery, the material misrepresentations of Green would have tainted the summary judgment and entitled Foley to the granting of his 60(b)(3) motion as established by the test adopted by this circuit in Square Const. Co. vs. Washington, et al. 657 F.2d 68 (4th Cir. 1981). Green's unabashed position seems to be that Foley should be penalized for not uncovering Green's fraud sooner. The irony is more shocking than amusing.

The recent letter by Mr. Green's counsel states that I claimed to have been "sandbagged" by untimely responses to discovery. Such was not my argument to the panel. My argument focused on the dipositive and uncontroverted defense of payment by the partnership and Green's

misrepresentations which have led us down this long road.

In point of fact, production of the vitally important Green letter, which put Foley's counsel on the trail of the conspiracy, was not even the result of a good faith effort by Green to comply with discovery. To the contrary, counsel for Green has acknowledged that he "let the cat out of the bag" quite unintentionally (see page 29 lines 10 thru 15 of the Zimpel deposition transcript attached).

This response is written, (with a superfluity of caution, perhaps) to ensure that there will be no sandbagging

of any one, by misdirection or otherwise.

Respectfully submitted,

John R. Hartnett

cc: Lawrence E. Freedman

PARTIAL TRANSCRIPT

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

- - - - - - - - - - - - - x

GARY GREEN, :

Plaintiff, :

: At Law No.

vs. : 76682

STEPHEN M. ZIMPEL, et al.:

Defendants. :

- - - - - - - - - - - - - x

Alexandria, Virginia

Tuesday, October 6, 1987

Deposition of STEPHEN M. ZIMPEL, defendant, called examination by counsel for Maurice P. Foley, pursuant to notice, at the offices of Brincefield & Associates, 526 King Street, Suite 423, Alexandria, Virginia 22314, before Rebekah J. Johnson, a notary public in and for the

Commonwealth of Virginia, beginning at 11:20 a.m., when were present on behalf of the respective parties:

FOR THE PLAINTIFF:

LAWRENCE E. FREEDMAN, ESQ., 10560 Main Street, Penthouse Nine, Fairfax, Virginia 22030.

FOR THE DEFENDANT ZIMPEL:

LYNN A. BRENNER, ESQ., 10521 Judicial Drive, Suite 305, Fairfax, Virginia 22030.

FOR MAURICE P. FOLEY:

JOHN R. HARTNETT, ESQ, Brincefield & Associates, 526 King Street, Suite 423, Alexandria, Virginia 22314.

my opinion that's why in another lawsuit Mr. Green produced this because he did not regard it as privileged.

MR. FREEDMAN: Well, now your assumption is totally inaccurate in that

particular instance. On behalf of Mr. Green we would extend the information that the communications existing and in leading up to this particular action did involve legal advice and as such if Mr. Zimpel chooses to raise the privilege it's his choice, but it does exist.

Secondly, the reason that the letter was produced was not as a result of privilege. I'll tell you frankly that the reason the letter was produced was because I in error allowed it to be produced, and having let the cat out of the bag it was gone and there was nothing else I could do about it. I've had to live with it ever since. But this may have been nothing more than a memorialization of an arrangement between them as it related to fees being owed. I consider fees being owed to me as attorney as much a part of the privilege

of a client as anything else, at least the basis and the foundation of those fees are, in any event.

MR HARTNETT: I'm not asking for the basis or the foundation of the fees. What I am asking about is the

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GARY GREEN, :
:
Plaintiff, :
:
vs. :
:
MAURICE P. FOLEY, :
:
Defendant. :

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

A. Statement of Facts

After the submission of Briefs and upon oral argument, Plaintiff's Motion for Summary Judgment was granted on July 22, 1987 as to Count I of Plaintiff's Complaint. On the date of argument, Defendant's counsel was provided with Plaintiff's Response to Defendant's Request for Production of Documents wherein Plaintiff produced the letter of Plaintiff to Mr. Alan Silverstein and Mr. Stephen M. Zimpel dated December 14, 1984

(hereinafter referred to as "Fee Agreement Letter"). A copy of the letter is attached hereto as Exhibit "A".

In the Fee Agreement Letter, Plaintiff confirmed his agreement with Silverstein and Zimpel that they would purchase from the banks notes and guarantees signed by Defendant in exchange for forgiveness of a debt owed to Plaintiff in the amount of $10,000.00. In his Motion for Reconsideration, Defendant referred to this letter at p. 4 of his Brief and attached it as Exhibit "D". That Motion for Reconsideration was denied on July 29, 1987.

Defendant now claims that he learned "for the first time, that the promissory note and guaranty agreement... were not purchased form the payee bank by Green". Legally and factually, Defendant's argument is without merit. Zimpel and

Silverstein did not purchase the notes; Plaintiff did. The transaction was accomplished when Zimpel and Silverstein bought a cashier check from Sovran Bank in Plaintiff's name. That check was then used by Green to buy the notes from Sovran Bank. In the Fee Agreement Letter, Plaintiff specifically stated that the notes would be purchased by Silverstein and Zimpel in Plaintiff's name. This was exactly what occurred. Defendant agrees that the cashier check was purchased in Plaintiff's name and for Plaintiff's benefit. Thus there is no dispute about the essential issue. Furthermore, because Defendant had the Fee Agreement Letter and argued from the letter in his Motion for Reconsideration, it is not new evidence as Defendant now claims.

Secondly, Defendant argues that, based on the deposition of Zimpel, the

notes were paid off with funds out of the account of Fairfax Associates, Ltd. This is a misrepresentation of Zimpel's testimony. Zimpel testified that he took personal funds and deposited them in the partnership account, but withdrew them the next day and purchased the cashier's check in Plaintiff's name. (Zimpel deposition, p. 11-12). Neither Zimpel nor Silverstein had any obligation to put funds in the partnership account and the deposit was a mistake which was corrected the next day when the funds were withdrawn. At the time the cashier check was purchased, the funds were Zimpel's and Silverstein's personal funds which were transferred to Plaintiff when the cashier check was purchased in accordance with the terms of the Fee Agreement Letter. Zimpel's deposition gave Defendant no new evidence, but

merely concurred with the content of the Fee Agreement Letter which Defendant already had in his possession.

B. Argument

1. The Debt Was Not Satisfied and The Principal Debtor, Fairfax Associates, Did Not Pay Off The Debt

Zimpel's deposition establishes that Sovran Bank was paid by Plaintiff who was the beneficiary of a cashier check bought with the personal funds of Zimpel and Silverstein. This transaction was carried out strictly in accordance with the Fee Agreement Letter. Therefore, partnership funds were not used to pay the debt. More importantly, the obligation on the note was not extinguished and the instrument was not cancelled. In his brief, Defendant argues that the case of Bank v. Lay, 80 Va. 436, 44 (1885), is controlling in this action. On the

contrary, it is easily distinguished. In Bank, supra, the debtor intended to pay off the debt and did so in his own name. By contrast, Zimpel never intended to and never did pay off the debt. Instead, his debt (as well as the debt of Defendant and the partnership) was merely transferred to Plaintiff. The debt is still extant and Plaintiff is suing all parties to collect it. Plaintiff made the payment to Sovran Bank with Plaintiff's cashier check; Zimpel did not pay Sovran nor did any of the other obligers. It is hornbook law that the intention of the party who is making the payment is controlloing. Union Trust Corp. v. Fugate, 172, Va. 82 (1939). As a stranger to the debt, Plaintiff is deemed to be a purchaser rather than a payor. It is only when the debt is intentionally paid by a party to the obligation that the debt is

discharged. Aetna Casualty & Surety Co. v. Whaley, 173 Va. 11 (1939).

2. Green Engaged In No Misconduct, Nor Did He Make Any Misrepresentations To This Court Which Would Justify Relief From Judgment Due To Misconduct Or Newly Discovered Evidence.

At all times, Green accurately represented to this Court and to Defendant that he had purchased the note by cashier's check in his name (See Exhibit B). The funds with which the notes were purchased were acquired by Green according to the terms of the Fee Agreement Letter. The notes were purchased by Green for value from the two banks holding the notes in exchange for which Zimpel was released from a debt of attorney's fees owed to Green.

If Foley was prevented from advancing his "meritorious defense of payment", as alleged in Defendant's brief, it was

by Defendant's counsel's misinterpretation of, or failure to read, the Fee Agreement Letter and, most recently, Defendant misstatement of Zimpel's testimony.

In order to prevail on a Motion for Relief from Judgment, the "newly discovered evidence" must be such that it was not and could not have been discovered in time to raise in the original proceedings. United States v. Williams, 674 F.2d 310 (4th Cir. 1982). As noted above, Defendant had the Fee Agreement Letter at the time that Plaintiff's Motion for Summary Judgment was heard and Defendant raised it in his Motion for Reconsideration. In addition, Defendant simply failed to take Zimpel's deposition in a timely fashion. What Defendant now claims is "new discovered evidence" is actually evidence that he both had

discovered, and, as to Zimpel, could have discovered, in time to raise in the original proceeding. Most significant is the fact that nothing Zimpel said is inconsistent with the Fee Agreement Letter. Indeed, Zimpel merely confirmed that the Fee Agreement Letter was implemented strictly according to its terms. This is hardly "newly discovered" evidence. Defendant's Motion must therefore be denied.

3. Defendant's Counsel's Failure to Discover the Evidence, or to Interpret it Properly, is not Grounds for Relief from Judgment

Defendant is not entitled to relief under Federal Rule of Civil Procedure 60(b). As established above, Defendant's counsel had before him the Fee Agreement Letter and argued from it before Summary Judgment was confirmed. The deposition of Stephen Zimpel demonstrated only that

Plaintiff and Zimpel lived up to the transaction contemplated by that letter. The transaction did not result in the extinguishment of the debt. Plaintiff was not a party to the underlying transactions, and he clearly purchased the notes for value. Defendant's attorney now seeks to add a new "spin" to the very transaction he relied on previously. An attorney's failure to conduct a more thorough review of the case or to make every argument available does not constitute excusable neglect under Rule 60(b). In Chick Kam Choo v. Exxon Corp., 699 F.2d 693 (5th Cir. 1983), cert. den. (1983) 78 Led. 2d. 103, the Court stated at p. 695:

> With regard to the "excusable neglect" contention, a leading commentator has pointed out:
>
> [A] party cannot have relief under Rule 60(b)(1) merely

> because he is unhappy with the judgment. Instead he must make some showing of why he was justified in failing to avoid mistake or inadvertence. Gross carelessness is not enough. Ignorance of the rules is not enough, nor is ignorance of the law...
>
> 11 Wright and Miller, Federal Practice and Procedure, Sec. 2858 at p. 170.

As in Chick Kam Choo, supra, Defendant's attorney's original view of the case was not the result of being denied the true facts but was the result solely of his original litigation strategy and analysis. Counsel's failure to argue his new version of the significance of the Fee Agreement Letter does not support Defendant's F.R.C.P. 60(b) Motion.

4. This Court has no Jurisdiction to Hear Defendant's Motion for Relief

Defendant filed an Appeal in the United States Court of Appeals for the Fourth Circuit on August 18, 1987. Once

an appeal has been taken, the District Court is divested of jurisdiction unless the Court of Appeals remands the case. Miller v. United States, 114 F.2d 267 (7th Cir. 1940). The District Court is without the power to grant relief under rule 60(b) except with permission of the Appellate Court which permission has not been granted in this case. Venen v. Sweet, 758 F.2d 117 (3d Cir. 1985).

As Defendant has already filed his Appeal, and the Court of Appeals has not remanded the case for this Court's consideration, the Defendant's Motion must be dismissed for lack of jurisdiction.

C. Conclusion

For all of the arguments set forth above, Defendant's Motion for Relief must be Denied.

Respectfully Submitted,

LAWRENCE FREEDMAN, ESQ.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GARY GREEN	)	
	)	
Appellee	)	
	)	
vs.	)	Docket No. 87-2639
	)	
MAURICE P. FOLEY	)	
	)	
Appellant	)	

AGREED DESIGNATION OF RECORD

DESIGNATIONS FROM RECORD ON MOTION FOR RELIEF FROM JUDGEMENT PURSUANT TO F.R.C.P. 60(b)(3) 10/30/87

2. NOTICE returnable 10-23-87 together with MOTION for relief from judgment; BRIEF in support of same - filed by deft. cc

3. RESPONSE to deft's motion for relief from judgment - filed by pltf. cc

4. ORDERED that the motion of deft. for relief from judgment entered in this action on 7-22-87 and 7-31-87 is denied - entered and filed (AVB). Copies sent. sp

5. NOTICE of Appeal of order of 10-30-87 - filed by Det. Foley. jgs

-- TRANSCRIPT of Proceedings before Judge Bryan on 10-30-87 - filed. jgs

DESIGNATION FROM RECORED OF U.S.D.C. FOR THE DISTRICT OF MARYLAND (TRANSFERRED TO EASTERN DISTRICT OF VIRGINIA)

1. COMPLAINT.

5. ANSWER of Defendant M. FOLEY (c/s)

16. ORDER (Hargrove, J.) dated 3/5/87, "GRANTING" Motion of Defendant for Change of Venue and transferring case to the United States District Court for the Eastern District of Virginia. (c/m 3/5/87 bma) (EOD 3/6/87 gez)

DESIGNATIONS FROM RECORDED ON SUMMARY JUDGMENT AND MOTION TO VACATE 7/22/87 AND 7/31/87

3. REQUEST for Admissions - filed by Deft. jgs.

4. FIRST set of Interrogatories filed by Deft. jgs.

5. NOTICE returnable 6-26-87 together with MOTION FOR SUMMARY JUDGMENT: AFFIDAVIT of pltf. in support therof - filed by pltf. cc

7. NOTICE returnable 6-26-87 together with MOTION FOR SUMMARY JUDGMENT: BRIEF in support of same - filed by deft Maurice Foley.

9. AFFIDAVIT in Support of Motion for SJ - filed by David L. Gunn. jgs.

10. AFFIDAVIT in Support of Motion for SJ - filed by A.J. Starinieri. jgs.

15. OPPOSITION to pltf's motion for summary judgment - filed by deft. cc

16. BRIEF in opposition to pltf's motion for sumary judgment - filed by deft. cc

17. RESPONSE to motion for summary judgment - filed by pltf. jn

-- TRIAL PROCEEDINGS: Judge Bryan. Reporter: McCoy. This matter came on

for hearing on cross motions for summary judgment. Counsel appeared. Motions argued and summary judgment granted in favor of pltf. in part and in favor of deft. in part. Counsel to submit original promissory notes to Court for preparation of order. sp

18. ORDERED that the motion of pltf. for summary judgment on 1-28-83 Guaranty of deft. Maurice Foley in the amount of $221,500.00 is granted and judgment is entered in favor of Green against Maurice Foley in the amount of $221,500.00 plus costs and attys.' fees; motion of pltf. for summary judgment on 8-2-82 Guaranty Agreement is denied; motion of deft. M. Foley for summary judgment is denied however pltf.'s claim for judgment in amount of $38.244.45

contained in complaint is dismissed w/o prej. to pltf.'s right to pursue collections of that amount in Circuit Court of Fx. Co., VA - entered and filed(AVB). Copies sent. sp

19. NOTICE returnable 7-31-87 together with MOTION to vacate summary judgment and grant rehearing and reconsideration;- BRIEF In support of same - filed by deft. cc

20. ORDER that the Motion to vacate SJ is denied (AVB) - ent & filed c/m jgs.

21. NOTICE of Appeal of order of 7-22-87 & 7-31-87 - filed by Deft. jgs.

-- TRANSCRIPT of Motion for SJ before Judge Bryan 7-2-87 - filed jgs

RESPECTFULLY SUBMITTED,

BRINCEFIELD & ASSOCIATES, P.C.

John R. Hartnett
526 King Street, Suite 423
Alexandria, Virginia 22314
(703) 836-2880
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellant's and Appellee's Agreed Designation of Record was mailed, first class, postage prepied this 10th day of December, 1987 to Lawrence E. Freedman, 10560 Main Street, Ph. 9, Fairfax, VA 22030, Counsel for Appellee.

John R. Hartnett

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

RECORD NO. 87-2639 (L)

GARY GREEN,
Appellee,

v.

MAURICE P. FOLEY,
Appellant.

JOINT APPENDIX

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

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